

## OVERVIEW OF THE QUEST FOR DEFINING THE ROLE OF AMC/GAL

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*It is necessary to determine whether the lawyer has been appointed as a guardian ad litem (GAL) charged with representing the child's best interests, or as an advocate, serving as counsel to the child....From the distinction between guardian and advocate flow a series of important consequences, including such matters as whether the attorney may file motions and examine witnesses, whether the attorney may file a report with the court, and whether the attorney may testify....Courts have struggled to clarify these roles, and define how children's representatives may participate in different types of proceedings.<sup>1</sup>*

"The biggest debate in the area of child representation is whether the lawyer should represent the "best interests" of the child or whether the lawyer should function in a traditional attorney/client relationship with the child."<sup>2</sup> While Connecticut does have separate statutes concerning the appointment of a Guardian Ad Litem<sup>3</sup> and Attorney for the Minor Child,<sup>4</sup> it does not have a set of standards for attorneys appointed pursuant to those statutes by which to guide them in their various roles. Various organizations have promulgated model rules and standards over the years; however, they differ in their recommendations leading to inconsistency in advocacy in both modes of representation. Below is a sampling of the leading organizations' recommendations:

### American Academy of Matrimonial Lawyers-

In 1994, the AAML published a set of standards that created a guideline for courts to assist it when appointing AMCs and GALs in custody matters. Essentially, the standards stated that courts should not automatically appoint AMCs or Guardians.

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<sup>1</sup> *Guardian Ad Litem*- Blacks Law Dictionary-8<sup>th</sup> Ed., p. 725, commentary; Clark, Homer H., Jr. & Estin, Ann Laquer, *Domestic Relations: Cases and Problems* 1078 (6<sup>th</sup> Ed. 2000).

<sup>2</sup> Elrod, Linda D.-*Client-Directed Lawyers For Children: It Is The "Right" Thing To Do*, 27 Pace L.Rev. 869, 910(Summer, 2007).

<sup>3</sup> Connecticut General Statutes § 45a-132 states in essence that, in any proceeding, whether in the probate court, superior court or the family support magistrate division, a judge may appoint a guardian ad litem for a minor, incompetent, undetermined or unborn person or a group of same "if it appears to the judge or magistrate that one or more persons as individuals, or as members of a designated class or otherwise, may have an interest in the proceedings, and that one or more of them are minors, incompetent persons or persons undetermined or unborn at the time of the proceeding." The statute also allows for reasonable attorneys fees and a provides a warning that the court appointed GAL may be removed if it is determined that said removal would be in the child(ren's) best interest.

<sup>4</sup> Connecticut General Statutes § 46b-54 states that the court has the discretion to appoint an Attorney for the Minor Child (AMC) if it determines that to be in the best interests of the child and may do so on its own motion or in response to one or both parties' motion. Additionally, the court "may also" appoint counsel or the child(ren) in matters involving custody, care, education, visitation or support and that "[c]ounsel for the child or children shall be heard on all matters pertaining to the interests of any child, including the custody, care, support, education and visitation of the child, so long as the court deems such representation to be in the best interests of the child.

Those appointments instead should be "reserved" for special instances such as upon a party's request, or after hearings should the court deem it necessary to make an appointment. The AAML also determined that the court should specify the role of the AMC or Guardian, and if not specified, the AMC/Guardian's first task should be to get such clarification.

In the case of an AMC, a major consideration by the AAML is the determination of whether the child is impaired or unimpaired and, depending on which classification, the scope of the role would then be determined. If a child is deemed unimpaired, and any child above the age of 12 is presumed to be unimpaired, then the AMC's role is the same as though he were representing an adult client. For example, counsel would be "counsel of record"; he would consult with the child client and strive to attain the child's goals and objectives. When representing an impaired (usually younger) child, on the other hand, counsel's role is to gather facts for the decision maker to consider and which would not otherwise be brought to the decision maker's attention. Additionally, counsel is prohibited from advocating for a particular position and should encourage settlement.

In the case of a GAL, she should not recommend a position as to the outcome of a contested issue. Rather, she should encourage settlement, develop facts during the pretrial stage that the decision maker could use to make his own determination as to the outcome of the case and, at trial, the GAL should again bring the facts to the decision maker's attention for consideration. Additionally, the GAL will offer evidence or submit a report and shall be a witness subject to cross-examination.

Finally, the AAML advocates that all AMCs/GALs should receive adequate training prior to being appointed in to their respective positions.<sup>5</sup>

### **Recommendations of the Fordham Conference on Ethical Issues in the Legal Representation of Children-**

In 1996, The Fordham Conference was held to address the lack of standards that would otherwise provide guidance to practitioners who represent children in legal matters. As a result of that conference, a set of recommendations was established; and, similar to the AAML recommendations of 1994 insofar as those recommendations concern the attorney for the children, the Fordham Conference speaks to the *impaired* and *unimpaired* child. "The lawyer for a child who is not impaired (i.e. who has capacity to direct the representation) must allow the child to set the goals for the representation as would an adult client."<sup>6</sup> The Conference also recommends that any laws that allow for the appointment of a Guardian Ad Litem be rewritten to instead specifically authorize the lawyer to represent the child and, any law that is inconsistent with the role of a lawyer for the child should be eliminated. Further, any time the role of the lawyer is unclear, the lawyer should act as the child's lawyer and, should a lawyer be appointed

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<sup>5</sup> You will find that most of the organizations discussed herein advocate that AMCs/GALs receive adequate training prior to their participation in these types of matters.

<sup>6</sup> Recommendations of the Fordham Conference on Ethical Issues in the Legal Representation of Children; 6 Nev. L.J. 1408 (2006) (reprint of 64 Fordham L. Rev. 1301 (1996)).

to act as both the child's lawyer and Guardian Ad Litem, the lawyer should instead elect to represent the child as a lawyer. However, should that not be an option, then the lawyer should decline the appointment.

In representing the child, the Conference Report recommends that the lawyer meet with the child as soon as possible. In addition, he shall not represent any position without first discussing the matter with the child client. The lawyer should explain to the child, in a manner the child understands, what is taking place, to what extent their conversations are confidential, and discuss strategies. He should be nonjudgmental and non-coercive and shall be culturally competent. The Conference recommends children's lawyers be certified as a "child advocate" by an oversight body on the state or national level and, following certification, they should be mentored by more experienced lawyers. The training should include subjects such as interviewing, counseling, negotiation, cultural competence, roles of the lawyer/GAL, child development and psychology, to name a few. The Conference also recommends continuing legal education following certification and that family court judges also receive ongoing training in cultural competence, the role of the lawyer, child development and psychology, the impact on the child of the abuse and neglect system, the merits of a professional team approach, and substantive law and procedure.

In representing an impaired or preverbal child, the Conference recommends the lawyer exercise that representation with extreme caution as "nothing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients."<sup>7</sup> Lawyers representing impaired children should not use their own childhood or their understanding of differing backgrounds and child development and needs to form the basis of their decisions. The lawyer must first determine the legal interests of the child (which is any interest that the legal proceeding has authority to address) and then conduct a full and expeditious investigation as to the child's personality, family system, history and daily life. The lawyer should then organize those facts using genograms, chronologies and daily schedules to ensure that the lawyer is working with a completely detailed view of the child client as a unique individual.

With regard to the obligations of Guardians Ad Litem, while the Conference recommends that lawyers should only represent children in the role of the child's lawyer, there may be times when a lawyer is appointed as a GAL or as a court appointed investigator. That role may result in a contrary position to the child's lawyer. The Conference recommends that communication between the child and the GAL be kept confidential and free from compelled disclosure.

### **AMERICAN BAR ASSOCIATION-**

In 2003, the American Bar Association (ABA), in the hopes of setting "a standard for good practice and consistency in the appointment and performance of lawyers for children in custody cases," adopted a set of standards proposed by the Family Law Section of the ABA.<sup>8</sup> Those standards were proposed in response to the struggle of

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<sup>7</sup> *Id.* at 1414.

<sup>8</sup> American Bar Association Standards-find at: [http://www.abanet.org/family/reports/standards\\_childcustody.pdf](http://www.abanet.org/family/reports/standards_childcustody.pdf)

children's lawyers in resolving the "very real contradictions" between their perceived roles as lawyer, protector, investigator, and surrogate decision maker. Such contradictions have a tendency to "breed dissatisfaction and undermines public confidence in the legal system."<sup>9</sup>

The ABA proposes two main classifications of appointments in child custody cases: the child's attorney (CA) and the best interests attorney (BIA) and, in both categories, the appointed person must be a lawyer. In either role, the attorney must know his duties, powers and limitations in the particular role and he must have sufficient training, qualifications, compensation, time and authority to do his job properly with the support and cooperation of the courts and other institutions. The ABA has commended these standards "to all jurisdictions, individual lawyers, courts and child representation programs."<sup>10</sup>

The ABA described the CA as an attorney who independently represents the child and who owes the same duties of undivided loyalty, confidentiality and competent representation to the child as he would to an adult client. As a BIA, the attorney will also provide independent legal counsel for the child, but in this case, will look to protect the child's best interests, without being *bound* by the child's directives or objectives; however, this attorney may take into consideration those directives or objectives. According to the ABA, in either case, the lawyer will serve as a *lawyer* and will not be a witness or be permitted to offer opinion testimony. Once the court determines whether an attorney is necessary to advocate for the child, then it must determine whether a CA or BIA would be the best advocate in the particular case.

Some of the other similarities between the roles of the BIA and CA are: counsel should meet with the child and adapt all communications to the child's ability to comprehend; inform the child about the proceedings, and find out the child's views, to the extent possible; exercise independent judgment, be independent from the court and the other litigants and should participate fully in the case; conduct discovery and investigate factual and legal issues; develop independent theories and strategies; stay apprised of all proceedings affecting the child; attend meetings, depositions, conferences and court appearances; support the expediting of the proceedings; participate/initiate negotiations and mediations (but not as the mediator); file motions, petitions, responses and/or objections; pursue issues on behalf of the child, even if not within the particular custody case; file briefs if necessary and preserve issues for appeal; present and cross examine witnesses, offer exhibits and make arguments; protect the child if he is to be called as a witness; on appeal, protect the child's interests by perfecting the appeal and/or participating in appeals filed by other parties; and, ensure that orders are enforced.

As to the CA specifically, he should abide by the child's decisions about the objectives of representation, subject to the determination of whether the child is "impaired" in accordance with Rule 1.14. When a child does not express an objective,

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<sup>9</sup> Id. at p. 1

<sup>10</sup> Id.

the attorney should attempt to determine the child's wishes and advocate accordingly, and, if she cannot determine what the child's objective would be, then she should advocate for the child's legal interest<sup>11</sup> or request the appointment of a BIA. The lawyer should also request the appointment of a BIA if the child's directives would put the child at risk. The lawyer should do nothing to undermine the child's objectives and should obtain clear direction from the child whether he wishes the lawyer remain silent on particular issues or advocate a particular position.

As to the BIA specifically, she should investigate and advocate the child's best interests; investigate the child's views; report the child's views to the court, unless the child requests otherwise; and, use the information from the child to advocate his best interests without necessarily advocating for the child's position. In order for the BIA to determine the child's best interests, he must conduct a thorough and independent investigation by: reviewing court files and medical, educational and mental health records; contacting and meeting with parties; interviewing individuals significantly involved with the child; staying apprised of all relevant court proceedings. When advocating for the child's best interests, the BIA must be objective and not inject his personal values, philosophies or experiences. If the BIA believes that a particular settlement would be harmful to the child, then he must bring whatever facts necessary to the court's attention and seek out advice from experts when necessary.

Interestingly, the ABA does not use of the term guardian ad litem in its standards when discussing of the above roles. Rather, the standards explain that a GAL, who may be any person, may still be appointed to investigate matters and gather facts and may render an opinion at the request of the tribunal, but that person would not serve as a lawyer or be a party in the action. Therefore, the ABA thus suggests three possible types of child advocates from which the court may choose: the CA, the BIA or the non-lawyer GAL. The court must be mindful as to the needs of the child when making the appointment and it should be clear about the role the advocate is to assume.

#### **UNLV CONFERENCE ON REPRESENTING CHILDREN IN FAMILIES: CHILDREN'S ADVOCACY AND JUSTICE TEN YEARS AFTER FORDHAM**

This Conference, held in 2006, was for the purposes of promulgating recommendations that built upon the earlier Fordham Conference recommendations. These updated recommendations urge attorneys to "amplify children's voices in all of their complexity to confront the contradictions of client-directed, multi-disciplinary, holistic and contextual representation: to cabin themselves to their role as legal experts and to consult children, their families and others with relevant knowledge and expertise regarding the social and material interests of their child clients...".<sup>12</sup> This Conference Report concludes that "effective representation of children requires attorneys to

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<sup>11</sup> Legal interests are interests recognized in the law that can be protected by the courts, such as rights to services or support, rights to contact with family members, and due process and procedural rights.

<sup>12</sup> Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years after Fordham, 6 Nev. L.J. 592(2006).

simultaneously see each client through multiple lenses.”<sup>13</sup> Therefore, the child’s attorney must be specially trained to be able to recognize the many facets of the child client. The attorneys are to involve families, community, and professionals from other disciplines so that they may gain a better understanding of the individual child and what that child’s needs are all the while not injecting his own beliefs or acting without the child’s consent. The recommendations essentially are as follows:

Children’s attorneys should, with the child’s consent, become familiar with the child’s family, community and culture and he should have an open mind and not make assumptions based on culture, race, language, etc. This attorney should know his own biases and be able to separate those opinions, values and biases from his recommendations in the present case. He should avoid identifying with the client, he should keep the child at the center of the proceedings by encouraging client participation, and he should determine the scope of representation and convey that scope to the client in a manner the client will understand.

This Conference also determined that attorneys who represent children should be competent in not only their primary doctrinal areas of representation, but should also be knowledgeable about the range of remedies for individual and systemic civil rights violations; the content and application of the Indian Child Welfare Act; immigration issues, including the ability to identify children who may fall under the jurisdiction of immigration; international law and norms; cognitive development; and, family systems. Like the Fordham recommendations, further study is highly recommended.

#### **NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCCUSL)-**

The National Conference of Commissioners on Uniform State Laws held the most recent Conference in 2007 wherein it promulgated a set of rules, drafted by the Uniform Law Commission (ULC) and known as the Uniform Representation of Children in Abuse, Neglect and Child Custody Proceedings Act to be used in abuse, neglect and custody proceedings. This Act hopes to answer the long-standing question: “who should represent a child in a custody or abuse and neglect proceeding and what should be the nature of that representation?”<sup>14</sup> There are three categories of representatives described in this Act: a child’s attorney, a best interests attorney and a best interests advocate. The first carries out his representation of the child as a traditional attorney would—at the directive of the client. The second, while also a lawyer for the child, advocates for the child’s best interests based on applicable legal criteria and the unique circumstances and needs of the child. The third is a non-lawyer representative appointed by the court to investigate and make recommendations regarding the child’s welfare. The Act directs the court to use discretion when appointing any representative in custody matters and provides states with alternatives for adoption of the rules to be followed by the courts. Throughout the Act, as to each topic advanced, there is an alternative “A”, which sets forth specific rules for the specific topics, and an Alternative “B”, which states as to the particular topic, that the rules are “set forth in [insert

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<sup>13</sup> Id.

<sup>14</sup> Uniform Representation of Children in Abuse, Neglect and Custody Proceedings Act-find at [www.nccusl.org](http://www.nccusl.org)

reference to court rule or administrative guideline.]”<sup>15</sup> This alternative allows states to insert particular rules or guidelines that already cover the particular topic described in the Act.

Similar to the ABA’s recommendations, there are many similarities under the Act between the child’s attorney and best interests attorney’s duties, such as: both must be qualified through training and experience in the type of proceedings in which the appointment is made; they are to participate in the proceeding to the full extent necessary to represent the child; meet with the child and ascertaining, in an appropriate manner, the child’s needs, circumstances and views; consult with any best interests advocate for the child; investigate the facts relevant to the proceeding to the extent the attorney considers appropriate, including interviewing persons with significant knowledge of the child’s history and condition and reviewing relevant records; provide advice and counsel to the child; inform the child of the status of the proceeding and the opportunity to participate and, if necessary, facilitate the child’s participation in the proceeding; review and accept/deny any proposed stipulation concerning the child and explain to the court the basis for any rejection; take appropriate steps to expedite the proceeding; encourage settlement if appropriate.

The Act also set forth many distinctions in these roles as well. For instance, the child’s attorney owes the child duties of loyalty, confidentiality and competent representation as though he were representing an adult client. He shall explain the nature of this role to the child, in a manner the child understands and, once the relationship is formed, the attorney shall advocate any objectives of representation expressed by the child unless they are prohibited by law or without factual foundation. If the child’s attorney believes that the child lacks the capacity to direct the representation or refuses to do so, the attorney shall present to the court the position that serves the child’s best interests so long as the position is not in conflict with the child’s expressed wishes. Alternatively, the attorney may take no position on the issue in question or request an appointment of a best interests attorney or best interests advocate if one has not already been appointed. If the child’s attorney believes the child’s expressed wishes would be harmful, then the attorney shall request appointment of a best interests advocate; withdraw from representation and request representation of a best interests attorney; or continue the representation and request the appointment of a best interests attorney.

The best interests attorney, on the other hand, must advocate for the best interests of the child according to law and based on the circumstances and needs of the child and other facts relevant to the proceeding. She shall explain her role to the child and that the information the child provides her may be used by her in advocating the position to the court. The attorney may also, if the child desires, present any expressed objectives of the child, but the attorney is not bound by the child’s objectives. However, she shall consider the reasons underlying those objectives and the child’s developmental level in determining what to advocate. The attorney may not disclose or be compelled to disclose information relating to the representation of the child except as

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<sup>15</sup> Uniform Representation of Children in Abuse, Neglect and Child Custody Proceedings Act, generally.

permitted by applicable state rules, but may use the information for the purpose of performing her duties without disclosing that the child was the source of the information.

As to the best interests advocate, he shall investigate the facts relevant to the proceedings to the extent the advocate considers appropriate –including interviewing those who have a significant knowledge of the child's history and condition; review relevant records; consult with the child's attorney or best interests advocate; determine the child's expressed objectives in the proceeding; present those objectives to the court, if the child desires, by a report or other submission; consider the child's objectives in the proceeding without being bound by them; maintain confidentiality except as necessary to perform the duties of best interests advocate or as may be specifically provided by law of the state; if appropriate, present recommendations to the court by testimony or written report or both regarding the child's best interests and the foundation for those recommendations; provide copies of the report to the child's attorney; and encourage settlement and the use of alternative forms of dispute resolution and participate therein if appropriate under the state's law.

The Act further details procedures for accessing information, participating in the proceeding, rules regarding attorney work product and testimony, child's right of action, and fees and expenses that are worth reviewing.

#### **CONNECTICUT'S MOST RECENT LEADING CASE:**

In 2005, in the matter of Carrubba v. Moskowitz, 274 Conn. 533 (2005), our Supreme Court ruled that AMCs are immune from suit by a disgruntled parent. In so doing, the Court defined the role of the AMC as having "dual obligations" to assist the court in serving the child's best interests and to function as the child's advocate<sup>16</sup> "[and that] [t]he balancing of those competing roles in a particular case will depend on the age and maturity of the child."<sup>17</sup> Additionally, contrary to the traditional attorney's role of passionately advocating for the client's position, Carrubba ruled that the court appointed attorney is "not simply to parrot the child's expressed wishes... [but instead the AMC's] duty to secure the best interests of the child dictates that she must be more objective than a privately retained attorney...and that all relevant evidence must be brought before the court, whether or not it supports the child's expressed position."<sup>18</sup> The duty to the child's wishes must be subordinated to the duty to protect the child's best interests. The court ultimately concluded that the role of an AMC most closely resembles that of a GAL, and thus both should be granted immunity.

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<sup>16</sup> 274 Conn. At 545-6.

<sup>17</sup> Id.

<sup>18</sup> Id. at 544-45.



## CONCLUSION

Unless Connecticut (by rulemaking or legislation) adopts one of the comprehensive and model sets of standards, those materials promulgated by the ABA and other entities, may serve only as "good advice" for judges and lawyers. AMCs and GALs will continue to find their black letter descriptions of their roles in the holdings of cases, and the courts will define the roles by deciding, piecemeal, those questions that come before them in particular cases.

## ARTICLES CONCERNING THE VARIOUS ORGANIZATIONS' RECOMMENDATIONS/STANDARDS:

Sokolnicki, Edward -The Attorney as Guardian Ad Litem for a Child in Connecticut, 5 CTPRLJ 237, 238 (1991).

Haralambie, A., Glaser, D., Practical and Theoretical Problems with the AAML Standards for Representing 'Impaired' Children, Journal of the American Academy of Matrimonial Lawyers, Vol 13 pp. 57-93 Summer 1995.

Haralambie, Ann M.-Response to the Conference: Response to the Working Group on Determining the Best Interest of the Child Fordham Law Review, 64 Fordham L.Rev. 2013 (1996).

Atwood, Barbara Ann- Representing Children: The Ongoing Search for Clear and Workable Standards, 19 J. Am. Acad. Matrim. Law. 183, 214-15 (2005).

Berenberg, Barry J.- Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases; 36 NMLR 533, 534(Summer, 2006)

Elrod, Linda D.-Client-Directed Lawyers For Children: It Is The "Right" Thing To Do, 27 Pace L.Rev. 869, 910(Summer, 2007).

Atwood, Barbara Ann-The Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act: Bridging the Divide Between Pragmatism and Idealism, 42 Fam. L.Q. 63, 66(Summer, 2008).

Kaas, C., and Dornfeld, S., Advocating for Connecticut's Children During Their Parents' Divorces and Custody Disputes after Carrubba v. Moskowitz: The Past, The Present and The Future State of the Law for Attorneys for Minor Children and Guardians Ad Litem, 81 Conn. B. J. 229 (2007).